— AAML Chapter Reports —

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guests fired well over 1,000 shells that afternoon—and many targets were broken. Later, a local restaurant provided a Texas Hill Country dinner. A good time was had by all.

Virginia Fellows Oppose Marriage Ban

On May 13, 2014, , arguments were heard in the Fourth United States Circuit Court of Appeals in the case of *Bostic, et al v. Schaefer, III, et al*, which seeks to invalidate Virginia's same sex marriage ban. Virginia's primary ban is a constitutional amendment, passed by popular vote in 2006, in reaction to what was perceived by its proponents as necessary to pass constitutional muster as they interpreted decisions in other states invalidating bans where there was no such constitutional amendment. However the opponents also challenged all of the several other Virginia laws affecting same-sex relationships on the basis of the denial of due process and equal protection of the laws.

AAML Virginia Chapter President **Dennis Hottell** polled the Virginia Chapter membership and nearly 75% voted to file an *amicus* brief supporting the opponents of Virginia's same sex marriage ban. Briefing and arguments had been expedited by the Court of Appeals, and so the race was on to meet the filing deadline. Hottell appointed **Donald K. Butler** of Richmond, Virginia, as Chairman of the Amicus Committee that would prepare the brief and **Susan M. Butler** and **Daniel L. Gray** of Fairfax, Virginia to serve on the committee. Butler suggested that the most effective *amicus* would be one that emphasized an issue that perhaps the parties and other amici had not stressed: the denial of due process to and equal protection of the laws for parties who cannot be married and who therefore cannot avail themselves of the remedies in divorce proceedings, in the event of a break-up of the relationship, but which are available to opposite sex couples. In describing the interests of the Chapter as *amicus curiae*, the brief noted:

> **"The interest of *Amicus Curiae* in this case is the protection of access to justice for same-sex people who wish to marry and later wish to divorce, as well as the protection of the children of same-sex couple. This brief is submitted to highlight the impact of this Court's decision on Virginia residents who were legally married in other states and who now seek a divorce, as well as the impact on same-sex couples who are not able to legally marry in Virginia but still have financial entanglements, property interests, and children they have raised together, with limited legal recourse in the event that they separate."**

Should this "marriage" not succeed, these parties would be faced with instituting a multiplicity of legal proceedings to resolve their ownership of property. Furthermore, the non-biological partner, who was their child's mother in California, does not have the same standing in Virginia as does the partner who gave birth to her. This affects not only the rights of one of the partners but the child as well. This was the second argument in the brief: the denial of marriage equality denies access to justice for gay and lesbian couples and their children.

Plaintiffs were joined for this appeal, each having a different set of circumstances presenting two distinct standings to challenge the law. Bostic and London are a couple who were denied a marriage license by the defendant clerk of the court, whereas Schall and Townley are a couple who had been lawfully married in California and were therefore legal parents of their teenage daughter. However, when they moved to Virginia, they were not considered married. Their case underscores the basic premise of the brief that divorce, like marriage, is a fundamental right. Initially there were two clerks as parties defendant and proponents of the ban. However, during the appeal process, one of them reversed positions and filed an *amicus* brief opposing the ban. In a further twist, upon becoming Virginia's Attorney General in January 2014, **Mark Herring** announced that his office would not support the proponent's case and supported the opponents in this appeal instead.

The opponents of the ban prevailed in the United States District Court for the Eastern District of Virginia, where the **Judge Arenda Wright** relied heavily on comparisons to the *Loving* case that struck down Virginia's anti-miscegenation laws in 1967. The proponents brought this appeal, arguing what has become a commonplace approach consisting of the following: *(1)* tradition; *(2)* federalism; and *(3)* "responsible procreation" and "optional child rearing."

Butler attended the oral arguments and reported that one of the three judges appeared to favor the opponents, another appeared to favor the proponents, and the third said very little during oral argument that

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indicated any leaning one way or the other. However, as would any experienced appellate attorney, Butler cautioned that one cannot always discern how a judge will rule from what is said at oral argument.

Judge Roger Gregory took the proponents to task in oral argument when they posed that the ban on same-sex marriage was for the benefit of children. Gregory appropriately questions that how the ban could possibly help children when in fact it would harm children of parents who could not be lawfully married. The case of Schall and Townley is particularly compelling there because the teenage daughter in that case came to Virginia with her parents, lawfully married in California, only to then be thrown into the status of having parents who were not married. Furthermore, she would not be recognized as the child of the parent who hand not bore her. On the other side, Presiding **Judge Paul Niemeyer** dwelled on the observation that what the opponents were seeking was recognition of an entirely new status of a relationship, and that it could not be a marriage in the traditional sense because they were not different sexes. Of course arguments were made about the proponent's position that marriage is for the purpose of procreation which elicited counter arguments that octogenarians, and the otherwise infertile should also be denied the right to marry.

The presiding judge noted that the Court recognized that this case was before them as a mere stopover to the Supreme Court of the United States, and he promised they would render a prompt decision.